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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JANE DOE, individually and on
4 behalf of all others similarly
5 situated,

6 Plaintiff,

New York, N.Y.

7 v.

22 Civ. 10019 (JSR)

8 JPMORGAN CHASE BANK, N.A.,

9 Defendant/Third-Party
10 Plaintiff.

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11 GOVERNMENT OF THE UNITED
12 STATES VIRGIN ISLANDS,

13 Plaintiff,

14 v.

22 Civ. 10904 (JSR)

15 JPMORGAN CHASE, N.A.,

16 Defendant/Third-Party
17 Plaintiff.

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18 JPMORGAN CHASE, N.A.,

19 Third-Party Plaintiff,

20 v.

21 JAMES EDWARD STALEY,

22 Third-Party Defendant.

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Argument

May 26, 2023

2:00 p.m.

23 Before:

24 HON. JED S. RAKOFF,

25 District Judge

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APPEARANCES

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ALAN SCHOENFELD

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(Case called; appearances noted)

THE COURT: Good afternoon. We're here on the question of class certification.

I just got off the phone with counsel for the same parties who were calling from the deposition of Diamond, I think his name was, with a question, so you're missing all the fun, folks, but here we are. I think we ought to take up, first, the question of whether the expert report of a Jane Doe's putative expert should be considered on this motion.

I asked her to be here in case we had questions for her, but I'll start with questions for counsel. I guess my first question is how does she pronounce her name?

MS. MCCAWLEY: That's a better question for Andrew. He's going to be handling the expert, and I'll be handling the class certification.

MR. VILLACASTIN: I didn't ask her this, your Honor, but I think it's Khodarkovsky.

THE COURT: So I'm looking at her report, and in the end of the report, after some 30 plus pages, she says, in paragraph 118, "given the above facts, and principles, and my expertise in the area, I herein state the following summary opinions: One, class certification is appropriate here in this multi-victim sex trafficking case where the victims allege that they've been subjected to similar abuse, manipulation, and coercive scheme by Epstein and his co-conspirators."

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1 That sounds to me like an opinion of what legal
2 conclusion the Court should make based on legal principles.
3 The law of the United States is clear, there's only one expert
4 on the law, and that is the judiciary, not any witness.

5 So should I strike that first opinion?

6 MR. VILLACASTIN: I don't believe so, your Honor.

7 This is Andrew Villacastin on behalf of Jane Doe.

8 You can ask Ms. Khodarkovsky herself. She testified
9 at deposition that she is not here to offer legal conclusions.

10 THE COURT: Then why isn't it -- under something
11 called the English language, why isn't the sole meaning of that
12 first opinion a legal conclusion?

13 MR. VILLACASTIN: So I would say it perhaps is a
14 matter of drafting. I ensure you that the intend --

15 THE COURT: Well, who drafted this?

16 MR. VILLACASTIN: Ms. Khodarkovsky did.

17 THE COURT: Did you review it?

18 MR. VILLACASTIN: I did, your Honor.

19 THE COURT: This is the penultimate -- this is where
20 she stated her opinions. Everything else is a lead up to this.
21 That's why she starts this paragraph by saying, given the above
22 facts and principles, et cetera. So I don't think it's a
23 question of wording or not. I strike that first opinion.

24 Let's turn to the second opinion: Class certification
25 is also appropriate, because Epstein and his co-conspirators

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1 would not be able to engage in the decades long sex trafficking
2 enterprise without access to capital, real and tangible
3 property, and societal influence, without the financial
4 infrastructure of this bank.

5 Now, putting aside the apparent grammatical error in
6 the last few words, where does her expertise include any
7 expertise on the financial infrastructure of the bank, on
8 societal influence, whatever the heck that means? The most she
9 seems to be saying is that he needed some money, although she
10 doesn't indicate what reason she has to believe that he
11 couldn't finance this with his own money; but I don't see where
12 her expertise, such as it may be, and that's been challenged of
13 course by your adversary, bears on any of that second opinion.

14 MR. VILLACASTIN: So, in order to put a framework for
15 the way that the report was written, I understand that this is
16 the summary opinions and conclusions that appear at the end of
17 the report. However, her opinions are scattered throughout the
18 report.

19 THE COURT: So you want me to go pick and choose? Oh,
20 there's something scattered in footnote 5. Oh, my gosh. How
21 could I have missed that? Oh, and there, on page 29, in a half
22 a sentence is some other thing that she didn't include in her
23 formal opinions, but I should take that into account, too.

24 Is that what you're saying?

25 MR. VILLACASTIN: Well, I believe, for example, in our

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1 opposition brief, we cited in pages 13 to 15 a number of common
2 factual issues that she identified with references to where
3 they were included in the report themselves.

4 THE COURT: So now answer my question. Why shouldn't
5 I strike that second opinion?

6 MR. VILLACASTIN: It would make sense, for example, to
7 strike the beginning part, class certification is appropriate,
8 because, as you said, you are the only legal expert in this
9 case. However, I would refer back to the balance of her
10 report. And you asked what was the expertise. The expertise
11 --

12 THE COURT: Yes. What's her expertise, aside from
13 what a jury would have on "societal influence?"

14 MR. VILLACASTIN: For example, societal influence, a
15 lot of the allegations concerning Epstein and how he was able
16 to run his sex trafficking venture is based on his access to
17 influential people: For example, bankers, lawyers, academics,
18 people who are in the front page of the news. And based on her
19 experience, that is something that is used, that status, or
20 that perception of status is used to control the victims within
21 his venture. So if, perhaps, another place to look at what her
22 expertise --

23 THE COURT: I'm sorry. Maybe I'm not following what
24 you just said. If her opinion is that people with contacts,
25 prominent contacts will often have more influence than people

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1 who don't, or that people with money will often have more
2 influence than people who don't, I guess I have two reactions.
3 The first is, duh; and the second is, why do we need an expert
4 on that?

5 MR. VILLACASTIN: I do think, your Honor, that it is a
6 matter of expertise, and her years of work --

7 THE COURT: Her years of associating with people who
8 have prominent friends gives her that expertise?

9 MR. VILLACASTIN: Not her personal involvement with
10 people with prominent friends, but investigating sex
11 trafficking ventures and organizations.

12 THE COURT: Your adversary says she didn't do much in
13 this area; she never tried a case in this area.

14 MR. VILLACASTIN: I think that's kind of an
15 unfortunate way to look at her experience. She worked for
16 three and a half years for -- as the sole person within -- she
17 worked for the Department of Justice for three and a half
18 years, and she worked closely with the human trafficking
19 prosecution unit. As we set forth in our brief, she was
20 involved in 5,200 cases, interviewed a number of sex
21 trafficking victims.

22 THE COURT: What is her expertise on the financial
23 infrastructure of JPMorgan Bank?

24 MR. VILLACASTIN: It doesn't have to be specific to
25 JPMorgan Bank, your Honor. I would note that she served --

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1 THE COURT: So if it doesn't -- let's say it's the
2 infrastructure of Signature Bank. What about that would be
3 relevant here?

4 MR. VILLACASTIN: So, for example, perhaps it's a
5 matter of phrasing. It's not the financial structure of
6 JPMorgan Bank or Signature Bank. It's the financial structure
7 of a sex trafficking venture through the use of a bank. So the
8 expertise, your Honor, is this is beyond a lay person's
9 capability. She sifted through a multitude of financial
10 statements, including bank accounts, including spreadsheets of
11 financial records. These are things that perhaps when
12 presented to you, you found it was helpful when she culled from
13 that set the specific documents that proved points, but the
14 ability, for example, to identify a pattern of withdrawals, or
15 a pattern of creating new accounts to be able to evade red
16 flags --

17 THE COURT: What's her expertise of that?

18 MR. VILLACASTIN: Through her same experience in the
19 Department of Justice for three and a half years, her
20 continuing work in that space.

21 THE COURT: She's not an economist, is she?

22 MR. VILLACASTIN: She does not have a Ph.D. in
23 economy, but --

24 THE COURT: Has she ever worked for a bank?

25 MR. VILLACASTIN: I don't believe so, your Honor.

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1 But, you know, as you said yourself in the *Olin* case, there is
2 a liberal view "of the qualification or requirements of Rule
3 702, at least to the extent that a lack of formal training does
4 not necessarily disqualify an expert from testifying if he or
5 she has equivalent relevant practical experience."

6 I would submit here that --

7 THE COURT: I'm not sure that's part of the question
8 I'm asking. What is her practical experience, as opposed to
9 simply being a prosecutor?

10 MR. VILLACASTIN: A lot of it comes from her time as a
11 prosecutor, but during her time as a prosecutor, she developed
12 her skills, for example, to investigate financial institutions
13 such as JPMorgan, which puts her in a unique position to be
14 able to see how the transactions -- the management of the bank
15 accounts, and all of these things were used to facilitate
16 potentially Jeffrey Epstein's sex trafficking venture.

17 THE COURT: As you also pointed out a minute ago, the
18 first part of that opinion is, of course, a question for the
19 Court.

20 MR. VILLACASTIN: Absolutely, your Honor, and, again,
21 to put a framework of it, I do believe it is a matter of
22 drafting. She was appointed as an expert for the purposes of
23 class certification. Her opinions, however, are not legal
24 conclusions, but summaries of, you know, common factual issues.
25 And because it, you know, is within the context of class

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1 certification, this is perhaps, again, a drafting choice to
2 acknowledge the elements, perhaps place how her conclusions fit
3 within that framework, but in no means to suggest to the judge
4 that she is offering or trying to help reach a legal
5 conclusion.

6 THE COURT: So the third opinion, the only other
7 opinion, is "the victims were subjected to a common scheme and
8 pattern on the part of Epstein and his co-conspirators, who
9 were able to advance such scheme due to defendant's role in
10 concealing and facilitating large cash withdrawals, opening and
11 maintaining of duplicative purpose business and checking
12 accounts, and regularly providing Epstein and his
13 co-conspirators with additional funds in the form of loans and
14 credit, while knowing of the widespread and dangerous sex
15 trafficking venture."

16 That seems to embrace every issue that the jury, if
17 this case goes to a jury, would have to decide. What is it in
18 her expertise that she brings that would be different from what
19 the Court already knows in deciding class certification, or a
20 jury would know from common experience in deciding the merits?

21 MR. VILLACASTIN: Again, your Honor, I would break it
22 into two parts: One aspect is her expertise in sex
23 trafficking; the other is her expertise in the financial
24 infrastructure. And both perhaps come from her years at the
25 Department of Justice, where, again, she was the human

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1 trafficking finance specialist, but also the trial attorney in
2 its criminal division for money laundering and asset recovery
3 section. So while it is true that perhaps facts can be
4 presented to a jury, it is certainly helpful and useful to the
5 judge, who is a relevant audience at this stage, to have the
6 benefit of her report.

7 THE COURT: All right. Now, let me hear from counsel
8 for JPMorgan, who has raised a variety of other objections to
9 this expert, and then we'll hear again from counsel for Jane
10 Doe.

11 MS. ELLSWORTH: Thank you, your Honor.

12 Felicia Ellsworth on behalf of JPMorgan.

13 So, as your Honor's questions have previewed, we've
14 raised essentially three separate challenges to
15 Ms. Khodarkovsky's report or opinion being considered by the
16 Court for class certification purposes. The first is that
17 Ms. Khodarkovsky -- I'm sorry if I'm mispronouncing it -- does
18 not have the requisite expertise. She holds herself out both
19 in the expert report that your Honor was just reading from and
20 reaffirmed for the deposition that she sat for that she is
21 seeking to be qualified as an expert in sex trafficking, not as
22 an expert on the internal workings of a bank, not as an expert
23 on the way the money flows. An expert on sex trafficking.

24 And as we think we've made clear and tried to lay out
25 for the Court, we don't think she has an expertise to be

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1 qualified as an expert in sex trafficking. She's an attorney.
2 She has --

3 THE COURT: So just so I understand that first point,
4 really two points, you're saying, number one, you don't think
5 she has the expertise in sex trafficking; and, number two, that
6 doesn't make her an expert in societal influences, in bank
7 infrastructure, or all that other stuff?

8 MS. ELLSWORTH: Correct.

9 I don't think she has the expertise to be an expert in
10 either of those things, but as she has put herself forward -- I
11 should say counsel for Doe has put her forward as an expert in
12 sex trafficking. That is the way they chose to define her
13 expertise. That is the way she chose to define her expertise
14 when we asked her about it in her deposition. And I think as
15 has been clear from the briefing and the back and forth, the
16 sole thing that counsel is relying upon as providing her with
17 any expertise in sex trafficking is a three year and five month
18 stint in the Department of Justice. Not in the Department of
19 Justice's human trafficking unit, but, rather, in a money
20 laundering unit.

21 During that time, she did not enter an appearance as
22 counsel --

23 THE COURT: Of course anyone who served three and a
24 half years in the Department of Justice would be qualified as
25 an expert in endless bureaucracy, but that's not the issue

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1 before the Court.

2 MS. ELLSWORTH: Not today, your Honor, no.

3 Again, as an attorney, as a trial attorney, she did
4 not enter an appearance in any of the cases that, again,
5 counsel for Doe and Ms. Khodarkovsky have put forward as
6 providing a basis for some expertise in sex trafficking. Those
7 cases, most of them, were not even charged when she was with
8 the department. For the few that were charged when she was at
9 the department, she wasn't involved in the charging decision.
10 And, again, very few of them even involved the Trafficking
11 Victims Protection Act.

12 So it's not that the whole three years and five months
13 that she spent in DOJ could even be attributed to expertise,
14 but, more importantly, what she doesn't have the background in
15 is the question really before the Court, which is, is this
16 issue susceptible to treatment on a class-wide basis. And this
17 issue being the question of whether there's been a violation of
18 the Trafficking Victims Protection Act.

19 The expert reports that JPMorgan has put forward --

20 THE COURT: Well, I think the allegations, not all of
21 them, but are that Mr. Epstein lured many young girls into his
22 sex venture by enticing them to, for example, give him
23 massages, which then became ever more erotic, and then paying
24 them off with money, and sometimes paying them additional money
25 to recruit other young women; and I don't see -- this may be

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1 more a question for your adversary when he stands up in a
2 minute. I don't see why you need to be an expert to see that
3 if those allegations are true, they may well violate the sex
4 trafficking statute, and that if the money that he used to
5 carry this venture out was provided by a bank that knew or
6 should have known what he was up to, that they may be liable as
7 well. Those are important issues, but I don't see where
8 expertise adds anything.

9 MS. ELLSWORTH: Well, I agree that expertise, as to
10 the questions that your Honor just posed, is not -- or that
11 expertise in the form of expert testimony is not required.
12 Those are questions of fact and law for the Judge and jury as
13 to whether the facts are borne out, and whether those, in fact,
14 meet the elements of the TVPA. Where expertise is relevant,
15 and where Ms. Khodarkovsky lacks the expertise, is the question
16 of what does -- what, in fact, does human trafficking look
17 like, what are the indicia of sex trafficking, what are facts
18 and circumstances that are not consistent with that.

19 THE COURT: Now, it's not like we're writing on a
20 totally clean slate here. So there was an indictment that was
21 issued by the Southern District of New York U.S. Attorney in
22 2019 against Mr. Epstein. The grand jury that issued that
23 indictment found, to quote from paragraph one of that
24 indictment, "as set forth herein, over the course of many
25 years, Jeffrey Epstein, the defendant, sexually exploited and

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1 abused dozens of minor girls at his various homes."

2 It then goes on to, in paragraph two, say in
3 particular, "the defendant enticed and recruited and caused to
4 be enticed and recruited minor girls to visit his mansion in
5 Manhattan, his estate in Palm Beach, and other locations, to
6 engage in sex acts with him, after which he would give the
7 victims hundreds of dollars in cash. Moreover, and in order to
8 maintain and increase his supply of victims, Epstein also paid
9 certain of his victims to recruit additional girls to be
10 similarly abused by Epstein. In this way, Epstein created a
11 vast network of underage victims for him to sexually exploit."

12 Then it goes on for many pages to spell out more
13 details. Now, those, of course, are findings by a grand jury
14 made on probable cause. I see no reason why I can't take
15 account of them in deciding class certification. What I'm
16 having real trouble seeing is what the expert report adds to
17 what the grand jury has already concluded.

18 MS. ELLSWORTH: Well, I don't disagree with you there,
19 your Honor. What I do think is before the Court, and what your
20 Honor will hear when you take up the next motion, is the
21 question of whether the experience of the individuals that are
22 members of the putative class that Doe's counsel seeks to
23 certify, in fact, is susceptible to treatment on a class-wide
24 basis, given differences in -- a wide variety of differences
25 and experiences that all those individuals experienced.

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1 THE COURT: Yes, and that's a separate issue. But,
2 again, that might have been perhaps the subject of expertise by
3 a psychiatrist or a psychologist, which was offered, for
4 example, in the case before Judge Nathan, but that's not the
5 kind of expertise that's being offered here.

6 MS. ELLSWORTH: No, and I would just go on, your
7 Honor, in addition to Ms. Khodarkovsky's expertise as an expert
8 in sex trafficking, we do have other reasons why we think the
9 Court should exclude the opinion, and let me go through those
10 quickly. And I'm happy to answer any questions.

11 The second reason, in addition to the Rule 702,
12 failure to actually have the expertise is building off some of
13 the questions your Honor was asking counsel for Doe earlier,
14 which is a vast majority of the report and opinions being
15 offered are either legal conclusions, about the legislative
16 history of the TVPA, or about the elements of the offense,
17 which are not the appropriate subject of expert testimony, or
18 simply what I would call a recitation of facts and serving as
19 what is called by some Courts a mouthpiece for the lawyers in
20 providing information about why, or purporting to provide
21 information about why the discovery, the limited discovery,
22 frankly, that Ms. Khodarkovsky reviewed, she believes meets the
23 elements of the offense. That, of course, is the province of
24 the jury in this case, or the Judge, if it's tried to the
25 bench.

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1 So, really, the vast majority of the 30 plus pages
2 that your Honor was looking through contain conclusions or
3 information that are not the subject of expert testimony at
4 all. They usurp the Judge. They usurp the jury. Beyond that,
5 there is also the question of the reliability of the
6 information that Ms. Khodarkovsky relied on in arriving at
7 these conclusions both in her initial report and in a reply
8 report after both more discovery had occurred in the case and
9 after she had had the opportunity to review the expert report
10 submitted by JPMorgan in opposition to class certification.

11 There were two expert reports: One from an expert in
12 sex trafficking who has been qualified as an expert in numerous
13 courts and used by the Department of Justice frequently in sex
14 trafficking prosecutions; and one by a medical doctor who had
15 conducted an analysis, an assessment of the named plaintiff in
16 this case. And how different experiences may have been
17 experienced by that individual from a medical, psychiatric
18 perspective.

19 In response to that, Ms. Khodarkovsky submitted a
20 reply report that did nothing more but continue to parrot not
21 even all the discovery in the case. She did not review the
22 Epstein victims' compensation program data that was produced in
23 response to this Court's order that it be produced in response
24 to JPMorgan's subpoena. A huge trove of data was produced in a
25 spreadsheet and summary format that has been submitted to the

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1 Court in connection with class certification, and that
2 Ms. Khodarkovsky could have looked at to determine the
3 similarities, if any, between the putative class members and
4 the many, many differences between them.

5 She didn't review any of it at all. She didn't review
6 any of the proposed class members, including the named
7 plaintiff, or the 50 or so other individuals who purport to be
8 represented, or who class counsel purports to represent, to
9 have an understanding of those individuals' experience, and to
10 use that to support her proposed opinion about the
11 appropriateness of treating all of these cases as a monolithic
12 class.

13 So there are a variety of different problems, we
14 think, with this report, and the reason we brought this motion
15 is we don't think your Honor should consider it at all in
16 considering class certification and using your gatekeeper
17 function. And, in particular, because it is the primary, or
18 one of the primary sources on which the plaintiffs rely in
19 support of their motion for class certification.

20 They quote heavily from the First Amended Complaint,
21 and from Ms. Khodarkovsky's two reports. That's the primary
22 basis for their --

23 THE COURT: Well, we'll get to that point in a minute,
24 but that's why I brought to your attention what the grand jury
25 found, because those are findings of fact. They're not binding

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1 on me, but they were -- you talked about something the Court
2 can take cognizance of.

3 MS. ELLSWORTH: And I think the way the Court could
4 use those grand jury findings would be to ascertain something
5 not contested, which is Mr. Epstein was engaged in horrendous
6 criminal activity, including sex trafficking. That's not
7 something being contested at all by JPMorgan.

8 The question here is the experiences of those
9 individual victims are sufficiently similar such that they can
10 be treated on a class-wide basis.

11 THE COURT: We are getting a little more into what I
12 wanted to get to in a little while, but what the heck. If, in
13 fact, he engaged, as the grand jury found, as specific modus
14 operandi, and that involved numerous, as the grand jury found,
15 young girls, and then from the standpoint of class
16 certification, assuming there is evidence that the money that
17 he needed to run this venture came from JPMorgan Bank, and
18 assuming, which of course is contested, but assuming for these
19 purposes that JPMorgan Bank knew or should have known that
20 that's what the money was being used for, what does it matter
21 that any given victim may -- that there may be some nuances in
22 their particular situation?

23 MS. ELLSWORTH: Well, I'll let Mr. Schoenfeld address
24 these in greater detail when we argue that motion, but let me
25 say this. The evidence that has been adduced in this case to

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1 date has shown not nuances in the experience but, in fact,
2 very, very different types of experience in terms of duration,
3 location, you know, payment, or lack thereof, involvement in
4 enticing others to be a part of the organization, or not.

5 THE COURT: Yes. Well, rather than interrupt you on
6 that, let's go back to what you were talking about, and I think
7 it's time to hear from your adversary on the expert report,
8 because I remain, to be frank, very skeptical that this report
9 adds anything material to the Court's consideration.

10 MS. ELLSWORTH: Thank you, your Honor.

11 THE COURT: Thank you.

12 MR. VILLACASTIN: Your Honor, there were a number of
13 topics discussed, so I want to make sure that I hit them in the
14 order that they were discussed, but also to pivot to whatever
15 you want to focus on. The first is the allegation that
16 Ms. Khodarkovsky doesn't have the relevant expertise, and I'll
17 quote to you from the advisory notes to Rule 702, which says
18 "the text of Rule 702 expressly contemplates that an expert may
19 be qualified on the basis of experience."

20 Now, we heard argument from Ms. Ellsworth that she was
21 not a member of the human trafficking unit of the Department of
22 Justice. That's admitted.

23 THE COURT: No, I think what they're talking about in
24 that advisory note is like if you had a case involving a frozen
25 pipe in your basement, and someone was offered to opine as to

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1 the cause, you could offer a plumber. A plumber could say,
2 I've looked at 40,000 frozen pipes, and, in my experience, they
3 freeze because of insufficient insulation, or insufficient
4 construction, or insufficient design; and I've looked at this
5 particular frozen pipe, and I can see that it wasn't -- there
6 was plenty of insulation, so it wasn't a lack of insulation;
7 and it was properly connected up to the other pipes, so it
8 wasn't improperly constructed; and so it must have been, based
9 on my experience, bad design.

10 That's what they're talking about. That's not what
11 she has.

12 MR. VILLACASTIN: Your Honor, what you provided is one
13 example of where expertise would be relevant, but this is
14 another example. For example, you mentioned the phrase "modus
15 operandi" before. In the same way that --

16 THE COURT: I mean, to state -- I'm sorry. I keep
17 interrupting. Go ahead.

18 MR. VILLACASTIN: No. No. In the same way a plumber
19 who has dealt with a number of pipes throughout the course of
20 his career can gain an expertise that's admissible under the
21 flexible standard governing *Daubert*, in the same way a person
22 who has interviewed, for example, up to 100 sex trafficking
23 victims would gain relevant expertise as to whether or not
24 someone such as Jeffrey Epstein would have a modus operandi.

25 I agree, for example, that you read from an indictment

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1 that provided findings of fact, and I don't dispute necessarily
2 that any report would be necessary, but the inquiry here is not
3 whether it's needed. The inquiry is whether or not the report
4 is useful and the testimony is useful. And here, certainly,
5 based on her qualifications -- and I do want to correct
6 something.

7 THE COURT: Your adversary pointed out that it's
8 riddled with legal conclusions, and the fact that the expert
9 disclaims that she's giving any legal opinion, a much crueler
10 judge than me might describe it as hypocrisy.

11 MR. VILLACASTIN: I agree, and that's why we're lucky
12 that we're before you, your Honor, because there was no doubt
13 in my mind that you even needed a *Daubert* hearing in the first
14 place, because you are certainly qualified and, you know,
15 perhaps willing to, you know, know immediately whether or not a
16 certain sentence or paragraph describes a legal conclusion
17 which you would not accept. However, you can also identify,
18 within the balance of her report, the factual conclusions that
19 she has framed as common questions, which would assist you.

20 One thing I wanted to hit was whether or not she was
21 offered, for example, solely for sex trafficking. To be clear,
22 she was offered for sex trafficking, but I'll direct the Court
23 to page 16, note 6 of our opposition, which quotes from her
24 report at page 12; and it lists a litany of things where a lay
25 person would certainly benefit from the testimony of

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1 Ms. Khodarkovsky's expertise. Due diligence. KYC, for
2 example, is not known to lay people as "know your customers."
3 The myriad of financial regulations that govern banking
4 conduct, and how --

5 THE COURT: Let's consider all that. Aren't those
6 regulations laws?

7 MR. VILLACASTIN: Absolutely, your Honor.

8 THE COURT: Isn't the only expert on the laws the
9 Court?

10 MR. VILLACASTIN: On the law, yes, your Honor, but
11 perhaps you are not an expert on how sex trafficking ventures
12 structure their withdrawals or, you know, pick the number of
13 bank accounts in order to evade those regulations. So
14 familiarity with policies, procedures, and how, you know,
15 financial institutions structure their policies and procedures
16 to comply with those laws and how, on top of that, sex
17 trafficking ventures would evade that, that's not an issue of
18 law. That's an issue of fact, your Honor.

19 THE COURT: Where does she state that she is being
20 offered as an expert in banking practices?

21 MR. VILLACASTIN: I read, again, in the report on page
22 12, and we summarize it --

23 THE COURT: Hold on. Just let me take a look at it.
24 Page 12.

25 All right. Here's what I think you're referring to.

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Paragraph --

MR. VILLACASTIN: Thirty-nine.

THE COURT: -- 39, yes. "In this matter, I am offering my expert testimony regarding human trafficking, specifically sex trafficking, and how the necessary financial infrastructure can facilitate and support the sex trafficking enterprise, including, one, the common factual issues concerning the application of the chapter 77 statutes, including what issues will likely be raised in assessing the plaintiffs' claims and what are typical, common, and reasonable responses of victims to direct and structural forms of coercion, especially in situations involving sex trafficking, sexual abuse and assault, and other chapter 77 offenses. Additionally, the factual issues concerning the financial institutions' federal, state, and regulatory obligations that facilitated and supported the Epstein sex trafficking network, including the bank's due diligence, know your customer, and other risk protocols."

Now, most of that is, such as all the reference to chapter 77, to sex trafficking, but where she says how the necessary financial infrastructure can facilitate and support the sex trafficking enterprise, is she saying that because it was necessary, the bank had no choice?

MR. VILLACASTIN: I missed that. Which sentence were you reading, your Honor?

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1 THE COURT: The very first sentence in paragraph 39.
2 "In this matter, I am offering my expert testimony regarding
3 human trafficking, specifically sex trafficking, and how the
4 necessary financial infrastructure can facilitate and support
5 the sex trafficking enterprise." I'm saying, is she saying
6 there that -- what does she mean by "necessary financial
7 infrastructure?"

8 MR. VILLACASTIN: Right. Every sex trafficking
9 operation needs a way to move cash in order to finance the sex
10 trafficking operation. You know, I understand perhaps the word
11 "necessary" is a little redundant when the balance of the
12 sentence says "can facilitate and support the sex trafficking
13 enterprise," but certainly a large component of this case,
14 perhaps the crux of this case is JPMorgan's actions, and how he
15 was able to use his accounts with JPMorgan to --

16 THE COURT: No, but so if the issue that you're
17 referring to, which is, of course, a central issue in this
18 case, is whether, when they gave him money in various
19 arrangements, JPMorgan knew or should have known, because
20 there's a negligence count here as well, that he was using that
21 money to facilitate his sex trafficking venture, where does her
22 expertise bear on that at all?

23 MR. VILLACASTIN: It's precisely to the "knowingly
24 benefited," your Honor. In, for example, the TVPA claim,
25 certainly you'll have a number of deposition witnesses, for

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1 example, that will throw their hand in the air and say, there's
2 no way I could have known until, for example, a news article
3 hit, or he was arrested, but her expertise in actually combing
4 through the filings that were made, or weren't made, whether or
5 not currency transaction reports were issued, suspicious
6 activity reports were or weren't issued, and the underlying
7 activity within her accounts, that is all within a matter of
8 expertise that is beyond that of a lay person.

9 THE COURT: I thought I saw in one of your briefs the
10 notion -- the suggestion that the Court could not possibly know
11 about suspicious activity reports. Is that because I've been
12 asleep during the 99 cases or so that have referred to those?

13 MR. VILLACASTIN: Certainly we all -- again, it's
14 not -- the standard isn't necessary, and certainly you're a
15 very experienced and intelligent judge. However, it's still
16 helpful to you --

17 THE COURT: You ought to talk to my wife, and she'll
18 give you the contrary view, but go ahead.

19 MR. VILLACASTIN: No, and perhaps a lot of the things
20 that come before you are after a suspicious activity report had
21 already been filed. Her expertise is before a suspicious
22 activity report has been filed, before a currency transaction
23 report has been filed. In the absence of that, when people
24 have been structuring their activity to evade such reports, her
25 ability to ferret out that information through a meticulous

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1 review of the financial data, which is beyond the abilities of
2 the normal lawyer --

3 (Continued on next page)

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1 THE COURT: No, but just to break that down -- and
2 maybe I'm missing your point -- so you could well have evidence
3 at trial and at this stage as well, that if they had followed
4 the legally binding requirements, they would have filed the
5 suspicious activity report, but they didn't -- although there
6 are plenty of times when they did, and that's another part of
7 your argument as to why they knew what was going on -- but
8 those are two separate points. If your further point is that
9 not only did they not file a suspicious activity report when
10 the regulations said they should have, but they disguised it in
11 such a way to avoid that obligation, that's an interesting
12 factual matter, but I don't see where her expertise brings
13 anything additional to that discussion.

14 MR. VILLACASTIN: I didn't know who the subject of
15 your sentence was, in terms of who disguised it. For example,
16 it could have been Epstein and his cohorts who structured their
17 financial transactions. But specific to the conduct of
18 JPMorgan, their employees, we allege, should often have picked
19 up on this suspicious activity or on ways in which they were --

20 THE COURT: Right. But that sounds like, at a
21 minimum, a question of negligence. Where is her expertise? I
22 know what the law of negligence is, and I'll be able to apply
23 it in resolving this motion and in instructing the jury. Where
24 is her expertise, anything other than just telling me what I
25 learned in first year tort class?

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1 MR. VILLACASTIN: I mean, negligence would be for
2 JPMorgan and its employees to say that they had no idea and
3 they took reasonable care and couldn't detect it. Her
4 expertise and her experience looking at financial transactions
5 and how they're structured by sex trafficking ventures would
6 assist in that determination, did they really not know, is that
7 really what happened? Or is it that they turned a blind eye
8 when they had sufficient indicia to either terminate Epstein
9 from his customer relationship with JPMorgan or, again, file or
10 alert the authorities, do anything that would have stopped at
11 any year in our class period --

12 THE COURT: Well, even on that -- and I'm not sure she
13 is giving that information -- but that goes to the credibility
14 of a particular witness. That's not what she's offering her
15 expertise here. She's offering her expertise on class
16 certification.

17 MR. VILLACASTIN: Right. First of all, there is
18 common evidence concerning the bank's knowledge -- what I think
19 my colleague, Ms. McCawley, will get into later -- but from her
20 review of the records, she can identify the same employees at
21 JPMorgan who looked at the same documents or the same
22 transactions and should have reached perhaps different
23 conclusions, based on what was available to them at any point
24 in time in the class period.

25 Again, this is not something that would not benefit

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1 from an expert with expertise in reviewing financial records,
2 years prosecuting and assisting in the prosecution of money
3 laundering operations.

4 THE COURT: All right. Anything else you wanted to
5 cover?

6 MR. VILLACASTIN: Just small things. They kind of
7 impugn her qualifications by saying she was not part of the
8 human trafficking unit. I refer to her report in our brief,
9 she worked closely with that unit. Ms. Ellsworth mentioned
10 that their experts were psychologists and psychiatrists.
11 Certainly, that's not a requirement at any point for rule 702,
12 just like a plumber could be qualified based on an expertise,
13 so should Ms. Khodarkovsky, where her expertise is far more
14 relevant than anything that can be provided by an advanced
15 legal degree.

16 One other issue that came up, again, is the amount of
17 materials that she reviewed in the course of issuing either of
18 her two reports; her opening and her reply. I do think the
19 Court has to be aware of the schedule that was in place. She
20 submitted her opening report on March 1st, which is when only
21 two productions from JPMorgan had been made, no depositions had
22 taken place. She has of course since caught up with her review
23 of the materials, but even when her reply report was issued on
24 April 24th, we still did not have access to the EVCP material.
25 She reviewed that because it was produced a day or two before

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1 her deposition. And to correct Ms. Ellsworth, she did review
2 the spreadsheet, for example, she did review the productions
3 from the Epstein Victims Compensation Fund, but the fact of the
4 matter is, it doesn't change her opinion. I'm not aware of
5 your familiarity with what was produced, but it was in heavily
6 redacted form, it was --

7 THE COURT: I'm not particularly bothered by that.
8 But a different point is the reason it usually doesn't even
9 matter what discovery has been provided is that an expert is
10 providing general principles and methodologies, that's what
11 rule 702 requires, a reliable methodology. I'm not seeing here
12 what her methodology was, I'm not seeing here what her error
13 rate is, I'm not seeing here compliance with any of the aspects
14 of Daubert. Now, it's true that Daubert says that those four
15 or five factors, depending how you count them, are not
16 absolutely required and that the Court has to apply a flexible
17 approach, but nevertheless, it's relevant to look at those
18 factors and it doesn't look like she complied with any of them.

19 MR. VILLACASTIN: As the Court noted, those factors
20 are flexible. In terms of whether or not an error rate would
21 exist in this type of analysis, it just doesn't apply. Here,
22 certainly, she has sufficient facts, she was able to review the
23 discovery that was in place at the time, and she relied on her
24 experience, which is certainly a basis for qualifying an
25 expert. The methodology would be relying on --

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1 THE COURT: Daubert and its progeny changed all that.
2 It used to be that all you had to show was that you were
3 testifying to something that was not within the common
4 experience of the finder of fact -- query whether she even
5 qualifies there, but let's assume for the moment that she
6 does -- then the law was dramatically changed by Daubert and
7 its progeny. Daubert, of course, was directed at scientific
8 evidence, and it got then extended in Kumho Tire and other
9 cases, but to say that it's just sufficient to say she's got
10 some relevant experience from a time that she looked at some of
11 these other cases when she was at DOJ is, I think, not in
12 keeping with the kind of, quote, rigorous analysis, close
13 quote, that the Supreme Court has repeatedly said that a judge
14 must exercise in a Daubert analysis.

15 MR. VILLACASTIN: Certainly, the case law repeats that
16 Daubert is a rigorous inquiry. However, it is still the case
17 that, under Second Circuit precedent, rule 702 embodies a
18 liberal standard of admissibility. And especially at class
19 action classification, the inquiry is cabined by the purpose,
20 which is looking for whether or not you can establish the
21 requirements of rule 23.

22 I do think the nature of the expertise differs. This
23 is not a damages expert doing regression analysis where the
24 typical factors of Daubert or Kumho would apply. Here, again,
25 using a flexible approach, she reliably based her opinions on

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1 her expertise and on her practical experience and then reached
2 the conclusions that she did.

3 THE COURT: Thank you very much.

4 Anything else that defense counsel wanted to say,
5 because I do want to move on.

6 MS. ELLSWORTH: No. Thank you, your Honor.

7 THE COURT: So let's turn to class certification in
8 general. While it's ultimately the plaintiffs' burden, I want
9 to go back to defense counsel first.

10 Your colleague has just acknowledged, as indeed
11 JPMorgan has repeatedly, that they do not dispute, you do not
12 dispute that Mr. Epstein was engaged in a longtime sex
13 trafficking venture that involved enumerable young women and
14 that required money to make it work. And I also don't believe
15 you dispute that, during the relevant period -- or at least
16 part of the relevant period -- that money was coming from
17 JPMorgan. And therefore, one would think that this easily
18 satisfies class certification for any of the victims of
19 Mr. Epstein and that the only real question is whether JPMorgan
20 knew or should have known what Mr. Epstein was up to.

21 MR. SCHOENFELD: Certainly, your Honor. So I think
22 the indictments are actually a great place to start with that.
23 The Epstein indictment, even though it was issued in 2019,
24 covers only the period 2002 to 2005.

25 THE COURT: Yes, that's true. And why does that not

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1 cut against you? Because it shows -- for example, you attack
2 via your papers, numerosity -- it shows that even during that
3 short period, there were dozens of victims.

4 MR. SCHOENFELD: So I'll get to the victims in one
5 moment. I don't think it says dozens. In any event --

6 THE COURT: Excuse me. Let's look at the indictment.
7 The first sentence, "As set forth herein, over the
8 course of many years, Jeffrey Epstein, the defendant, sexually
9 exploited and abused dozens of minor girls."

10 MR. SCHOENFELD: Your Honor, I think the critical
11 point is --

12 THE COURT: So it does say dozens?

13 MR. SCHOENFELD: It does, but it says --

14 THE COURT: Thank you.

15 MR. SCHOENFELD: So I take your point. But it also
16 says "sexually exploited and abused," and I think one of the
17 critical elements of the indictment is that there's only one
18 sex trafficking charge, and it's not as to all of the victims
19 identified in the indictment; it is only as to Minor Victim 1.
20 Even though many of the --

21 THE COURT: Dozens of minor victims.

22 MR. SCHOENFELD: Dozens of minor victims, again --

23 THE COURT: In a short period of time, whereas the
24 complaint raises a much longer period of time.

25 MR. SCHOENFELD: It does. And so I would like to make

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1 two points on that.

2 First, the period, 2002 to 2005, which again, in 2019,
3 the Southern District of New York chose to charge Mr. Epstein
4 on, is clearly time barred. There's a ten-year statute of
5 limitations under the TVPA. With respect to that period, I
6 think it's critical that the indictment talks a lot about
7 different victims of Mr. Epstein's sexual exploitation and
8 sexual abuse, but then it only makes one sex trafficking charge
9 and only as to MV-1.

10 It's also important that the victims in this
11 indictment are minors. Minors do not require a showing of
12 fraud, coercion or force, which is an important individualizing
13 factor. If you look at -- and of course, the plaintiff in this
14 case was not a minor during any time that she was abused by
15 Mr. Epstein.

16 If you look at the Maxwell indictment, which is also
17 in the record, it's even more stark. That indictment was
18 issued in 2020. It covers even an earlier period, 1994 to
19 2004, and while it recites a number of victims, MV-1, MV-2,
20 MV-3, MV-4 and has conspiracy charges about taking women
21 outside the United States for purposes of -- I think it refers
22 to -- sexual assault, there's again only one sex trafficking
23 charge, and that's as against MV-4, so --

24 THE COURT: Wait a minute. Didn't I hear your
25 colleague about ten minutes ago say that you do not dispute

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1 that Mr. Epstein was engaged for many years in a sex
2 trafficking venture? Did I mishear that?

3 MR. SCHOENFELD: I don't recall the specific words she
4 used.

5 I think the critical point -- and I don't mean to
6 argue with the Court or my colleague -- I think the critical
7 point --

8 THE COURT: Well, if you want to argue with a
9 colleague, you can go outside.

10 MR. SCHOENFELD: I think the critical point for class
11 certification is that the sex trafficking statute is very
12 particularly written and there are very specific requirements.
13 It needs to be a commercial sex act, as defined in the statute,
14 not any other form of sexual abuse, no matter how odious; not
15 sexual exploitation, not all forms of sexual abuse. And for
16 victims who were 18 or older, there needs to be a showing of
17 force, fraud and coercion.

18 I think the class certification record is clear here
19 that those gating elements, what establishes whether someone is
20 a victim and whether they have a TVPA claim at all are
21 individualized.

22 I would also emphasize that both indictments talk
23 about the fact that there were phases to the conspiracy that
24 Maxwell and Epstein participated in. That's absolutely true
25 and that defeats commonality. There is no common, class-wide

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1 proof -- which is the language of Dukes and Comcast -- that
2 could establish liability across the class period here.

3 Plaintiffs' counsel decided to name this class from
4 1998 to 2019. There is no evidence in the record that runs the
5 gamut between 1998 to 2019. It is episodic.

6 THE COURT: I want to hear your adversary on that
7 point. But all that would mean is I would narrow the years
8 covered by the class certification. I wouldn't eliminate class
9 certification.

10 MR. SCHOENFELD: So I have thought a lot about this
11 point. I think that is true. The Court could obviously
12 shorten the class period.

13 But here is the problem, if you shorten the class
14 period, you still need to figure out whether every class member
15 has a TVPA claim relative to however you shorten the class
16 period. So if the Court were to determine or a jury determined
17 that JPMC had actual or constructive knowledge as of 2006 --
18 which again is time barred and which again precedes the
19 enactment of the operative TVPA --

20 THE COURT: Those are separate issues.

21 MR. SCHOENFELD: Separate issues, bracketing those.

22 But let's say the jury finds that JPMC had actual or
23 constructive knowledge as of 2006, that does the jury, in a
24 class action case, no good because every single putative class
25 member then needs to establish through individual proof when

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1 she was victimized. And so it defeats the purpose of a class
2 action to have individual mini trials on all of the gating
3 elements that would establish who is a member of the class in
4 the first place. And so there is no efficiency. You are
5 grimacing, so I want to answer that question.

6 THE COURT: Maybe I'm missing the force of that
7 argument.

8 So let's say we had a garden-variety securities class
9 action involving anyone who purchased or sold the stock of the
10 widget company between such and such a date and such and such a
11 date, the fact that there are a lot of people out there who
12 might think they're members of the class but couldn't meet
13 those requirements would never defeat class certification.
14 What would happen is that, if there was a recovery, it would be
15 limited to people who meet that class definition, and then they
16 would have to put in -- this is what typically does happen --
17 there's a distribution agent and, before he will pay out any
18 money, you have to put in your brokerage records that show,
19 yes, indeed, you bought within that class period or you sold
20 within that class period and otherwise, you can't recover. Why
21 is that any different from here?

22 MR. SCHOENFELD: So in that case, you have everyone
23 who purchased or sold shares in widget company between the
24 issuance of the prospectus on September 1st, 2019 and the date
25 of the announcement of some investigation that led to a stock

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1 drop in 2022, you know who those people are; there are records
2 and there are common questions.

3 THE COURT: You don't have to know who those people
4 are. All you have to know is that there are a lot of people,
5 for sure who fit that bill, and that's enough to have class
6 certification. And then if they don't fit the bill, they won't
7 be able to qualify for recovery.

8 MR. SCHOENFELD: In those circumstances, there's no
9 predominance issue. The identification of those individual
10 class members doesn't predominate over the common questions of
11 whether a misrepresentation was made.

12 Here, however, let's say you established that common
13 proof for some period of the class established JPMC's actual or
14 constructive knowledge, that's all you have, that's one element
15 of an incredibly complex statute that starts at identifying
16 victims. Each victim needs to demonstrate that they were
17 caused to engage in a commercial sex act through force, fraud
18 or coercion. You have no idea who those class members are, and
19 that can't be determined unless a jury decides.

20 And your Honor has seen enough cases that involve
21 sexual abuse or sexual assault to know the complexity of all of
22 those issues in one case, let alone over what plaintiffs claim
23 is dozens or hundreds of the victims who compose the class.

24 So this is nothing like a securities case where you
25 can engage with transactional data at the end of the case, you

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1 find a firm that's able to just process things --

2 THE COURT: With respect to those who are minors, none
3 of that would be true; right?

4 MR. SCHOENFELD: With respect to minors, they still
5 need to have been caused to engage in a commercial sex act.
6 There's no requirement of force, fraud or coercion.

7 But again, I remind the Court, those indictments talk
8 about minor victims and don't allege sex trafficking as to all
9 of them. And I haven't gone back just now and read the Maxwell
10 one, but I think it refers specifically to sexual abuse and
11 sexual exploitation with respect to some of those documents. I
12 only emphasize the point because I think it underscores the
13 nuance in reaching this determination. The TVPA does not cover
14 every form of sexual abuse or assault or exploitation, no
15 matter how heinous. It is very particular.

16 And again, I would just remind the Court, because I
17 think that this is a critical issue for typicality, for
18 adequacy and also for all of the commonality and predominance
19 issues we're talking about, the statute of limitations is ten
20 years. The complaint was filed November 24th, 2022, so we go
21 back to November 24th, 2012. There is strong evidence on the
22 record that Jane Doe has no claim that postdates that period.
23 And everything we have talked about so far in terms of --

24 THE COURT: Again, I'm not sure what you are saying
25 there.

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1 Are you saying that if I limited the class to people
2 who had sex with Mr. Epstein whose last sexual episode with
3 Mr. Epstein was beyond the statute of limitations that I still
4 couldn't certify the class?

5 MR. SCHOENFELD: Absolutely. You don't have Jane Doe
6 as a member of that class, so you have no class representative.

7 Number two, there's no demonstration, number one, of
8 numerosity; number two, of any common conduct by JPMorgan
9 Chase. The bank exited the relationship eight months later,
10 after the non-time barred period began. If the Court were to
11 reach that conclusion, which is the only available conclusion
12 under the law, there's a class representative issues; it fails
13 at 23A. There's a typicality issue, of course, a person who is
14 not a member of the class can't be typical of the class,
15 there's a numerosity issue, and I don't think there's any
16 proof -- and this is plaintiffs' burden -- of commonality or
17 predominance for that non-time barred period.

18 We have gotten a ways away from the indictments, so
19 I'm very happy to continue, but I just want to make sure --

20 THE COURT: Well, why don't I put you on pause for a
21 minute and hear what your adversary has to say about the
22 matters we have just discussed.

23 MS. MCCAWLEY: Thank you, your Honor.

24 There can be no case more worthy of class
25 certification than this case, where these groups of victims

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1 were viciously harmed by JPMorgan's conduct of facilitating
2 Jeffrey Epstein's sex trafficking scheme. And what has gotten
3 lost here in the dialogue this morning by my colleague is the
4 fact that this focuses on the bank's conduct.

5 Of course, JPMorgan would love to have you focus on
6 individual issues and create this parade of foibles that you
7 won't be able to decide this, your Honor. But the class
8 certification at issue here is the bank's conduct, their course
9 of conduct; that was common as to all class members. What did
10 the bank do here? The bank engaged in a number of --

11 THE COURT: So you are saying, if I understand, the
12 real question, even from a class certification, is did the bank
13 know -- or under the negligence claim, should it have known --
14 within the statutory period that Mr. Epstein was engaging in an
15 exploitive sexual venture in violation of the sex trafficking
16 statute and did it nevertheless continue to do business with
17 him, indeed facilitate his misconduct by disguising
18 transactions to be something other than they were or failing to
19 act on a duty to report, et cetera, et cetera.

20 MS. MCCAWLEY: Correct, your Honor.

21 THE COURT: So I understand that argument. I think
22 it's a strong argument.

23 My question, though, is, then, to whom under that
24 theory is the bank liable in this civil lawsuit?

25 MS. MCCAWLEY: To whom? The bank is liable to the

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1 class members, because their course of conduct allowed Epstein
2 to run this sex trafficking scheme for many, many years.
3 Without JPMorgan's conduct, he would have had to stop. He
4 needed the obscene amounts of cash that were withdrawn from
5 JPMorgan. He needed them to be turning a blind eye and not
6 reporting to regulators. He needed them --

7 THE COURT: Forgive me for interrupting, but I'm
8 incorrigible in that respect.

9 Let's say, taking it most favorably to the plaintiff,
10 JPMorgan didn't know or should have known by no earlier than
11 year X, then shouldn't the class period begin with year X,
12 rather than -- even assuming we have a class -- rather than go
13 back to earlier?

14 MS. MCCAWLEY: No, your Honor. With respect to the
15 class period -- and I want to be a little careful here; at some
16 point I may need a sidebar to address some of the material
17 related to some of the reporting that they should have been
18 doing -- but there is clear evidence in the record that our
19 class period is covered. There's clear evidence in the record
20 that the bank knew about Epstein's conduct and was failing to
21 do the things that they should have done and that allowed
22 Epstein's conduct to continue.

23 THE COURT: Starting when?

24 MS. MCCAWLEY: Starting in the early 2000s.

25 THE COURT: And what's your evidence of that?

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1 MS. MCCAWLEY: The evidence, your Honor -- and I'm
2 just a little uncertain, I'm trying to be cautious here,
3 whether I need to have a sidebar to --

4 THE COURT: Because of reference to the suspicious
5 activity reports that were filed that may be subject to some
6 provision of the Bank Secrecy Act?

7 Although, in this little contretemps that's been going
8 on over the last week involving a document that was filed, if I
9 recall, none of the specifics were set forth, there is just a
10 number of suspicious activity reports, which I'm not so sure is
11 covered by the Bank Secrecy Act. But in any event, if you feel
12 you need a sidebar, of course, come up with your adversary.

13 But why don't you tell me, before you do that, what
14 evidence, other than the suspicious activity reports, do you
15 rely on to show that JPMorgan knew what Epstein was up to on
16 the year you just referenced.

17 MS. MCCAWLEY: Yes, your Honor.

18 So that is a big piece of it. The account activity,
19 as well, is a big piece of that. Looking at that account
20 activity, looking at the cash withdrawals, looking at the
21 structuring that was going on. We also have, of course, victim
22 testimony. There are individuals that were given money from
23 various accounts that are relevant to this inquiry. So there's
24 a number of things from a factual perspective that we contend
25 cover our class period.

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1 THE COURT: Well, notwithstanding what you just said,
2 I think maybe we do need a sidebar on this one issue.

3 One counsel for each side. The court reporter will
4 place this under seal.

5 (Continued on next page)

6 (Pages 46through 47 SEALED)

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(In open court)

MS. MCCAWLEY: So, your Honor, with respect to the class certification issue, this conduct of the bank was common. So you, in the class certification context, can decide a number of issues all at once. They pertain to the class in its entirety. Those issues include, for example: Whether JPMorgan was providing nonroutine banking services; whether JPMorgan set forces in motion that caused the class members harm; whether JPMorgan knew or should have known that they were helping and benefiting from a sex trafficking venture; when JPMorgan knew about Epstein's crimes; whether JPMorgan obstructed the government's investigation; whether JPMorgan failed or obfuscated certain filings that they should have been making. All of those issues are common to the class as a whole, and they can be decided by the Court and they all affect the class as a whole. So in this case, when your Honor is charged with looking at things like numerosity, typicality, commonality, adequacy and, of course, whether those issues predominate, clearly, it does here. All of those issues are relevant to the trial, all of those issues will need to be decided in one fell swoop by the jury.

And I submit to you, in a case like this, where we are talking about hundreds of victims, it's inherently unfair to have them have to proceed individually in trials. We're against one of the largest banks in the world, and the

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1 discovery here, as you have seen, has been overwhelming, I
2 mean, unheard of, right, so to have individuals have to --

3 THE COURT: I'm not sure unheard of, but --

4 MS. MCCAWLEY: Yes.

5 THE COURT: I'm not really sure overwhelming. Let's
6 just put it this way, there's been a substantial amount of
7 discovery, and that's why I'm glad I gave you all so much time
8 to get through it.

9 MS. MCCAWLEY: Thank you, your Honor.

10 Yes, well, I submit that this is really a case where
11 class certification is so well suited.

12 And you have some guidance here, your Honor. There
13 are other cases in the TVPA context where classes have been
14 certified just like this. The case that we cite in our papers,
15 the Tenedo case v. Baton Rouge, those are cases where under the
16 TVPA classes have been certified. And all of these issues that
17 the defendants are raising here, where they're claiming there
18 are individual issues that would preclude you from doing that,
19 those were all dismissed in those cases. If you focus on the
20 common practice of the bank, that applies to everybody. And
21 that's appropriate here for class certification. It's the most
22 efficient way to run this case, it's the most efficient way to
23 get justice for these victims. So we believe we have met the
24 elements.

25 I know your Honor has questions. I'm happy to walk

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1 through the elements, the prerequisites, if you would like, or
2 handle the argument however --

3 THE COURT: No. In a moment of weakness, I have
4 taught the seminar on class actions at NYU Law School for the
5 last four years, so I am at least modestly aware of the
6 individual requirements. So I don't think we need to go
7 through all of them.

8 MS. MCCAWLEY: Okay, great.

9 Well, the main issue for the Court to grapple with is
10 the predominance issue, whether these issues predominate. And
11 not only do those core issues that I talked about apply to all
12 the class members, but the same conduct of the bank applies to
13 all the class members: Whether they were giving these
14 obscenely large cash withdrawals appropriately; whether they
15 should have been investigating Epstein's accounts; whether they
16 had coconspirators being given money, known coconspirators that
17 were in indictments and other materials, and still allowing
18 them to set up accounts and give money to those individuals;
19 whether they should have been making certain reports. All of
20 those things apply to the class members as a whole, so that's
21 why the case, the common issues clearly predominate in this
22 instance.

23 THE COURT: Let me hear any rebuttal from your
24 adversary and anything else he wanted to say.

25 MR. SCHOENFELD: Certainly, your Honor.

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1 I'll try to be brief. I do want to address the case
2 law that plaintiffs' counsel relies on. There's not a single
3 class action certified in a sex trafficking case that
4 plaintiffs have identified. But here, again, one of the --

5 THE COURT: Have there been cases where it's been
6 turned down?

7 MR. SCHOENFELD: I'm not aware of either.

8 THE COURT: So it's -- oh, my gosh, I'm getting
9 nervous -- it's a new issue.

10 MR. SCHOENFELD: I don't want to overstate the
11 novelty, I know that wouldn't interest the Court.

12 I think the point that I want to make is the cases
13 where class actions have been certified under the TVPA arise
14 under a different provision on labor trafficking that has no
15 requirement of force, fraud or coercion. And if you look at
16 those cases, to the one, they involve written policies, written
17 into parties' contracts. Paguirigan involved a uniform fee
18 that was standard in all of the defendant's contracts. Menical
19 involved uniform policies. So we're just talking about a
20 different statutory regime and factual distinctions that I
21 think obliterate any of the issues we're talking about here.

22 I don't want to belabor any of these points. I think
23 I have talked about predominance and commonality.

24 But one of the things I think is surprising here, is
25 that, given what I think everyone recognizes are some really

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1 fundamental individualized issues going to who has a claim
2 under the TVPA, going to the calculation or determination of
3 damages, going to some of the negligence elements, the fact
4 that there's no trial plan here, which is precisely what the
5 rule 23 committee advises in complex cases like that, the Court
6 is left with no idea what this trial would look like. I'm sure
7 the Court has done lots of creative things in class actions and
8 bilateral litigation. But here, you have a limited number of
9 issues that plaintiffs say are common, not as to the entire
10 class period, but for part of the class period. What then?

11 You have to have individualized hearings on virtually
12 every aspect of this case. Any issue that plaintiffs say is
13 common and a jury or the Court determine may be common with
14 respect to some part of the class, all of them require some
15 fundamentally individualized inquiry to see whether that common
16 determination ultimately matters, whether any particular class
17 member has a TVPA claim or a negligence claim. I'm happy to
18 leave it there.

19 THE COURT: That's an interesting point. I don't
20 think it's relevant, but I'll note for the record that one of
21 the reasons that how to handle some of these issues at trial
22 have not resulted in a great deal of legal precedent is because
23 the great majority of class actions settle, so the Court never
24 had the chance to figure out how it would handle those kinds of
25 situations. But that's really just a side issue. That's not

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1 an answer to your point.

2 MR. SCHOENFELD: Yes, absolutely.

3 And if I might just make one point that's sort of
4 orthogonal to that. The release question here is important and
5 I just want to cite one distinction.

6 In evaluating the release in the Deutsche Bank case,
7 the Court said that the language of that release could not be
8 read to reach financial institutions that provided services to
9 Jeffrey Epstein. That is exactly what the EVCP release does
10 cover. It specifically says it covers persons and entities
11 that provided services to Jeffrey Epstein. The vast majority
12 of the class that the plaintiffs assert here signed those
13 releases through the EVCP.

14 So between the release issue and the statute of
15 limitations issue, there are serious numerosity issues in this
16 case, and they become even more profound as you start kind of
17 gerrymandering the case to get around the 2008 enactment date
18 of the TVPA provisions on the front end, the statute of
19 limitations on the back end. And that's in addition to all the
20 commonality and predominance issues we have been discussing.

21 THE COURT: Thank you very much.

22 And we'll hear, finally, from plaintiffs' counsel.

23 MS. MCCAWLEY: Thank you, your Honor. Just to
24 address, very quickly, a response to those points.

25 On the release issue, certainly, your Honor can deal

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1 with that in one fell swoop as to anybody who has a particular
2 release, because that release was all the same. But I would
3 direct your attention -- I think I heard my colleague say that
4 the language was different -- and I believe if you compare the
5 EVCP release with the release that you reviewed in Deutsche
6 Bank, the language mirrors it with the exception of the
7 additional language that was sort of the carve-out language in
8 a subsequent paragraph. But nevertheless, that language, if
9 you look at it, clearly was not intended to cover financial
10 institutions. They were not mentioned, they weren't
11 contemplated. But irrespective, to the extent that was
12 presented to the Court at summary judgment or otherwise, you
13 could decide that issue in one fell swoop. So we don't believe
14 that's preclusive of class certification.

15 And I would just like to finish, your Honor, by saying
16 that, again, the focus is on the bank's activity, that's common
17 as to everybody. Epstein could not have facilitated these
18 crimes without the help of JPMorgan. And that should be put
19 before a jury on a class-wide basis.

20 Again, just looking at the fairness of this process,
21 our Jane Doe has already had to undertake depositions, all
22 kinds of discovery, et cetera, for herself. She's done that on
23 the behalf of the class. This is an instance that would allow
24 those claims to be heard in that manner.

25 THE COURT: This, of course, is related to the

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1 predominance inquiry, but what you are saying is that the big,
2 glaring, central issue that's out there is did JPMorgan know or
3 should have known what was going on and why should that be the
4 subject of a hundred separate lawsuits when that's the critical
5 question.

6 (Continued on next page)

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(In open court)

MS. MCCAWLEY: Correct, your Honor.

So that goes to the superiority piece of that predominance analysis as well, and so we do firmly believe that this is the superior method for handling all of these claims.

THE COURT: Okay.

MS. MCCAWLEY: Thank you, your Honor.

THE COURT: So I am very grateful to counsel for both sides. I will take the matter, all the aspects that we've discussed today, under advisement.

I really am going to try to get you the full opinion, not just the bottom line order. Sometimes I have to go the bottom line order route just because of other things that are going on in my court, but hopefully the opinion and at least the bottom line order by June 20th.

MS. MCCAWLEY: Great. Thank you, your Honor.

THE COURT: Anything else we need to take up today?

Very good. Your friends are calling me at 5:00 from the Diamond deposition, so I'll screw up my courage and take their call.

Very good. Thanks a lot.

MS. MCCAWLEY: Thank you, your Honor.

(Adjourned)